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No. 77-833

In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH GOLDMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 563 F. 2d 501.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1977. A petition for rehearing was denied on November 11, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on December 9, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's Fifth Amendment privilege against compelled self-incrimination was violated by

testimony that, in the course of responding to questions by agents of the Federal Bureau of Investigation after his arrest and after having waived his right to remain silent, petitioner failed to answer two questions.

2. Whether petitioner was deprived of a fair trial by remarks in the prosecutor's closing argument.

STATEMENT

Following a jury trial in the United States District Court for the District of Rhode Island, petitioner was convicted of causing a falsely made and forged check to be transported in interstate or foreign commerce, in violation of 18 U.S.C. 2314. He was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that on August 15, 1975, a check in the amount of $8,000 was deposited in petitioner's account in the Citizen's Bank of Providence, Rhode Island (Tr. 13, 17). The check, which was made payable to petitioner and was signed "Max Lurner," had been drawn on a Canadian bank account that had a balance of only $3.09 (Tr. 78). Petitioner, using the name "Max Lurner," had opened the Canadian account two days earlier (Tr. 85-89). Before the check was returned to Citizen's Bank by the Canadian bank due to insufficient funds, Citizen's Bank had distributed more than $7,000 from petitioner's account (Tr. 16).[1] Statements mailed by Citizen's Bank to the address shown on petitioner's signature card were returned to the bank stamped "addressee unknown" (Tr. 24-25).

[1]Prior to the deposit of the $8,000 check, the balance in petitioner's Citizen's Bank account was less than $100 (Tr. 12-13).

2. Petitioner was arrested by F.B.I. Agent James Burleigh on November 10, 1975 (Tr. 138-140). At trial, Agent Burleigh testified that he had read petitioner his *Miranda* rights and that petitioner had signed a waiver of rights form (Tr. 141-142).[2] The agent then questioned petitioner, who freely admitted that he had cashed the $8,000 check drawn on the "Max Lurner" account at the Canadian bank, but denied that he was Lurner or that he had opened the Canadian account (Tr. 142). Petitioner explained that he and Lurner were involved together in the commodities market and that he had recently seen Lurner in Jerusalem (Tr. 143). Agent Burleigh then testified (*ibid.*):

> So I said, "Well, how did you find Mr. Lurner in Israel?" He said he had found him through some of his cousins in Jerusalem. I asked him, "Well, how about the name and address of the cousins?" He refused to answer.

Agent Burleigh also told the jury that, other than a description of Lurner, petitioner gave him no information concerning Lurner or his relatives and that, when the agent inquired about petitioner's possession of four blank checks from the Lurner account at the time of his arrest, petitioner "didn't respond" (Tr. 144-145).

1. Relying on *United States* v. *Hale*, 422 U.S. 171, and *Doyle* v. *Ohio*, 426 U.S. 610, petitioner contends (Pet. 6-11) that the introduction of evidence that he failed to answer certain questions during his interview by Agent Burleigh violated his Fifth Amendment privilege against self-incrimination. In *Hale* and *Doyle*, this Court held

[2]The contents of the waiver form signed by petitioner are set forth in the opinion of the court of appeals (Pet. App. 2a n. 1).

that a defendant's post-arrest silence, after having received *Miranda* warnings, could not be introduced to impeach his exculpatory testimony at trial. The rationale for these decisions was that

> [t]he warnings mandated by [*Miranda*], as a prophylactic means of safeguarding Fifth Amendment rights, * * * require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.

Doyle v. *Ohio*, *supra*, 426 U.S. at 617. See also *United States* v. *Hale*, *supra*, 422 U.S. at 177. The court of appeals correctly concluded that this rationale was inapposite in the context of this case and that petitioner's statements and refusals to answer were properly introduced for their probative value.

Unlike the defendants in *Hale* and *Doyle*, petitioner affirmatively waived his right to remain silent, voluntarily submitted to interrogation, answered a number of Agent Burleigh's questions, and never expressed a desire to end the interview. Having chosen to offer an exculpatory version of his actions, petitioner's selective refusal to respond to questions was not "insolubly ambiguous," and certainly did not suggest that petitioner's silence constituted an assertion of his constitutional rights, but rather strongly indicated that he had no satisfactory answers to the agent's inquiries. As the court of appeals observed (Pet. App. 5a), the record shows that petitioner's refusal

to answer "was simply a strategic choice, perhaps based on a fear that any answer might weaken [his] story." Moreover, in light of petitioner's decision to waive his right to remain silent, no fundamental unfairness inheres in using against him his failure to respond to certain difficult questions. In sum, Agent Burleigh's testimony was properly admitted at trial. See *United States* v. *Mitchell*, 558 F. 2d 1332, 1334-1335 (C.A. 8); *United States* v. *Berdick*, 555 F. 2d 1329, 1331 (C.A. 5), certiorari denied, No. 77-368, January 9, 1978; *United States* v. *Joyner*, 539 F. 2d 1162, 1165-1166 (C.A. 8), certiorari denied, 429 U.S. 983.[3]

2. Petitioner contends (Pet. 11-14) that he was deprived of a fair trial because the prosecutor referred during closing argument to petitioner's wearing a religious skull cap and suggested that the "religious symbol that this man wears has been defamed, defiled, and scandalized" (Pet. 5).

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[3]None of the cases cited by petitioner is in conflict with the decision below or establishes this to be a "troublesome area" (Pet. 7) requiring clarification by this Court. In *United States* v. *Impson*, 531 F. 2d 274 (C.A. 5), *United States* v. *Stevens*, 538 F. 2d 1203 (C.A. 5), and *Scarborough* v. *Arizona*, 531 F. 2d 959 (C.A. 9), the defendant did not sign a waiver of rights form, and his refusal to answer questions after his arrest was complete rather than selective. In *United States* v. *Johnson*, 558 F. 2d 1225 (C.A. 5), the defendant's silence was expressly based upon a desire to contact an attorney, while in *Boeckenhaupt* v. *United States*, 392 F. 2d 24 (C.A. 4), certiorari denied, 393 U.S. 896, a case decided prior to *Hale* and *Doyle*, the defendant's refusal to answer occurred after consultation with counsel. Hence, in both cases the defendant's conduct was "insolubly ambiguous" because it may have evidenced a determination to assert constitutional rights. Here, by contrast, petitioner's failure to respond to two of Agent Burleigh's many questions after signing a *Miranda* waiver unquestionably indicates his reluctance to answer a difficult question for tactical reasons rather than a decision to exercise his privilege against self-incrimination.

While we join the court of appeals in strongly disapproving these remarks, we agree with the court that any prejudice to petitioner as a result of the comments was substantially eliminated by the judge's curative instructions. See *Sawyer* v. *United States,* 202 U.S. 150, 167-168. Immediately following the government's closing argument, the court reminded the jurors (Tr. 183):

> In your consideration of this case in your jury room you look to the facts, members of the jury, as you find the facts, as you find the facts from the evidence in this case and you do so without passion, without prejudice, objectively. A man's religion or a man's attire has no bearing to the case. It must not enter into your deliberations.

The court returned to this point during its final instructions, stating that "you must disregard the argument made to you as to this man's religion or this man's dress in this courtroom, that is no part of your deliberation" (Tr. 193).

Viewed in the context of the entire trial and closing argument, the prosecuting attorney's comments were not "of a kind the jury could not put out of its mind after having been told to do so." *Taglianetti* v. *United States,* 398 F. 2d 558, 566 (C.A. 1), affirmed, 394 U.S. 316. Rather, the remarks, albeit unfortunate, "were minor aberrations" and certainly were not "cumulative evidence of a proceeding dominated by passion and prejudice * * *." *United States* v. *Socony-Vacuum Oil Co.,* 310

U.S. 150, 239-240. Especially in light of the overwhelming evidence of petitioner's guilt, the prosecutor's isolated statement could not have influenced the jury's verdict.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Petitioner admitted at the time of his arrest that he had deposited the fraudulent Canadian check in his Rhode Island bank account (Tr. 142), and he was positively identified as the man who had opened the "Max Lurner" account in Canada (Tr. 85-87). When arrested, petitioner had in his possession four blank checks from the "Max Lurner" account (Tr. 144). Compare *United States* v. *Grey,* 422 F. 2d 1043 (C.A. 6), certiorari denied *sub nom. Williams* v. *United States,* 400 U.S. 967, relied upon by petitioner, where "the facts [were] such as to indicate that such prejudicial tactics may have had a substantial influence upon the result of [the] trial" (422 F. 2d at 1046).

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